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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1984

LAWRENCE VANDENPLAS and BARBARA VANDENPLAS,

Petitioners,

vs.

CITY OF MUSKEGO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether principles of comity and federalism underlying 28 U.S.C. § 1738 require a clear federal rule of claim preclusion in cases such as this where state law preclusion principles are indeterminate and ambiguous with respect to the specific claim submitted to the federal courts.

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Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit filed January 21, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed January 21, 1985 and is set forth in the Appendix, pages App. 1-11.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners owned real property located in the City of Muskego, Wisconsin. The property was not residential, but rather was used to raise crops and to ranch cattle, hogs, and sheep. Located on the property were a barn and a building used as a grainery. Over the years the surrounding area—which, like most of Waukesha County, Wisconsin had been farming land historically—came to be developed as residential property. Although petitioners had ongoing undisputed

legal rights to continue using the property for farming purposes, the contiguity of farming and residential property precipitated efforts by City officials to curtail this use. Between 1968 and 1980 this aim of the City officials was persistently thwarted by petitioners' entirely lawful resistance. In August, 1980 the Building Inspector for the City, acting pursuant to empowerment by the City government, ordered the barn and grainery razed under a scheme established by state law, § 66.05, Wis. Stats. The raze order violated petitioners' equal protection and due process rights under the Fourteenth Amendment in that it treated the premises significantly different than other comparable non-inhabited farm premises within the City's jurisdiction pursuant to a statute which does not allow sufficient notice, hearing, or remedies to satisfy due process of law. In addition, the order was imposed as retaliatory punishment for petitioners' exercise of First Amendment rights to disagree with the City, to resist it in the courts, and to maintain the farm usage of their property in the face of residential objection. Petitioners secured a temporary restraining order and review of the Building Inspector's order pursuant to the exclusive remedy provisions of § 66.05(3), Wis. Stats. A court order entered on September 8, 1980 stayed the raze order's execution for six months allowing petitioners to conduct repairs. On March 12, 1981 petitioners sought an extension of the stay order. This request was denied and petitioners appealed, obtaining an interim appellate stay. The Wisconsin Court of Appeals dissolved the interim appellate stay and dismissed the case on April 15, 1981 holding that the original trial court order of September 8, 1980 was final; that no stay could be granted by that court of the Building Inspector's raze order once it was found reasonable; and, therefore, that no further extension of that stay could be granted in March, 1981. Petitioners were informed that the buildings were to be burned on May 11, 1981. Another temporary restraint was granted and a hearing was held on May 11, 1981. The trial court dissolved the restraint and dismissed the case because the Wisconsin Court of Appeals had held that the original stay of the September 8, 1980 raze order was unlawful and no power to permit repair existed o[illegible] the

reviewing court decided that the Building Inspector was reasonable in his discretionary determinations of building violations and unreasonable costs of repair. On May 14, 1981, petitioners sought a federal injunction against the imminent execution of the original raze order. The following day the federal court denied the injunction and dismissed the complaint, *sua sponte*, without an evidentiary hearing. The buildings were destroyed on June 12, 1981. Petitioners commenced this action in the United States District Court for the Eastern District of Wisconsin pursuant to 42 U.S.C. § 1983 on August 5, 1981. By decision dated July 22, 1982 the Court granted defendants' Motion for Summary Judgment on the issues relevant to this petition based on the grounds of *res judicata/* claim preclusion. The Seventh Circuit Court of Appeals affirmed in a decision dated January 21, 1985. It is from this decision that the Petitioners now request the United States Supreme Court to grant this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The case provides the United States Supreme Court with the opportunity of formulating a federal rule of claim preclusion for situations where state preclusion principles are indeterminate and ambiguous in regard to the specific claim submitted to the federal courts.

The Court of Appeals' decision affirming the decision of the trial court was proper in initially looking to Wisconsin principles of claim preclusion to decide the effect to be given to petitioners' prior state actions. *Migra* v. *Warren City School Dist. Bd. of Educ.*, 465 U.S. , 104 S.Ct. 892 (1984). When those principles proved indeterminate however, the Court of Appeals indulged in "a creative interpretation of ambiguous state law." *Marrese* v. *American Academy of Orthopaedic Surgeons*, 53 L.W. 4265 at 4269 (1985) (Burger, C.J., concurring). When state law is indeterminate, the concerns of comity and federalism underlying 28 U.S.C. § 1738 do not come into play and a clear federal rule of claim preclusion would best promote the federal and substantive interest protected by the rules of preclusion. *Id.*

The *res judicata* effect of proceedings pursuant to § 66.05, Wis. Stats., on subsequent constitutional claims has never been specifically addressed by the Wisconsin courts. In such a situation the federal courts must look to the general rules of *res judicata* applied by the state. *Migra, supra; Lee* v. *City of Peoria*, 685 F.2d 196 (CA 7th 1982). Under Wisconsin law, a final judgment is conclusive in all subsequent actions between the same parties as to all matters *which were litigated* (issue preclusion) or *might have been litigated* (claim preclusion) in the former proceedings. *Barbian* v. *Linder Bros. Trucking Co.*, 106 Wis.2d 291, 316 N.W.2d 371, 374 (1982). There must be an identity of parties and *an identity of causes of actions or claims* in the two cases before a bar will be imposed. *Id.*

Recently, the Wisconsin Supreme Court expressly adopted a "transactional" approach in determining the identity of causes of actions or claims. *DePratt* v. *West Bend Mut. Ins. Co.*, 113 Wis.2d 306, 334 N.W.2d 883 (1983). This approach asseses claims in factual terms, making them coterminous with the transaction "regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff...." *DePratt, supra*, 334 N.W.2d at 886 *quoting* the Restatement (Second) of Judgments, § 24 Comment A. (1982). The rationale for the adoption of the Restatement's "transactional" approach was Wisconsin's modern procedural system which "provides the parties with an adequate method of fully developing the entire transaction in one action going to the merits" and "permits the presentation ... of all material relevant to the transaction without artificial confinement to any single substantive theory or kind of relief without regard to historical forms of actions." *DePratt, supra*, 334 N.W.2d at 886 *citing* Restatement, *supra* § 24 Comment A. Based on these general principles of Wisconsin preclusion law, the Seventh Circuit Court of Appeals ruled that petitioners' claims would be barred in Wisconsin, hence the § 1983 claims must likewise be barred.

Although in most instances deductive reasoning from general principles to specific conclusions yields logical results, the Court of Appeals' decision in this case is nothing

less than "a creative interpretation of ambiguous state law." *Marrese, supra*, 53 L.W. at 4269 (Burger, C.J., concurring). Certainly the general principles of Wisconsin preclusion law, standing alone, might appear to bar petitioners' present action. Yet the express assumption behind those principles is a trial which provides "an adequate method of *fully developing the entire transaction*" and permits *"the presentation ... of all material relevant to the transaction without artificial confinement to any single substantive theory or kind of relief...."* (emphasis supplied) *DePratt, supra*, 334 N.W.2d at 886, citing Restatement, *supra* § 24 Comment A. The limited proceedings to challenge a § 66.05 raze order offered no such trial under these circumstances it is, to say the least, "ambiguous" whether the Wisconsin courts would apply the general rules of claim preclusion to the § 66.05 proceedings which directly contradict the rationale for those principles.

It is necessary then to recite the special mechanism Wisconsin law provides respecting the razing of buildings. Under § 66.05(a)(a), Wis. Stats., the building inspector of a city is permitted to make a discretionary judgment that certain buildings are so old, or so dilapidated, or so out of repair *as to be* dangerous, or unsafe, or unsanitary, or otherwise unfit *for* human habitation, or human occupancy, or human use. Phrased differently, the building inspector's permissive power to make such a discretionary judgment is limited only by the necessity for him to find one or more of three alternative statements of the conditions of the premises and one or more of four alternative statements of the effect of such a condition or conditions upon one or more of three human relationships to the buildings in question. But that is not all that the building inspector must find. He must also make a finding respecting whether the building is so "...old, dilapidated, or...out of repair..." "...that it would be unreasonable to repair the same...." That finding is aided by a statutory rebuttable, see *Posnanski* v. *City of West Allis*, 61 Wis.2d 461, 213 N.W.2d 51 (1973), presumption pursuant to § 66.05(1)(b), Wis. Stats., that it would be unreasonable so to repair when the cost of repair exceeds 50% of the property's value as established by § 66.05(1)(b)'s method of valuation. The consequence of a determination by

the building inspector that repair is unreasonable is to allow him to order the building razed. If no determination is made by the building inspector that repair is unreasonable, then the consequence is to require him to provide the building's owner with the option to repair in addition to the order to raze.

There is *only one method of judicial review under the statute, and it is,* by express legislative direction, *exclusive.* See § 66.05(3), Wis. Stats. See *Gehr* v. *Sheboygan*, 81 Wis.2d 117, 260 N.W.2d 30 at 34 and cases cited (1977); *Mohr* v. *City of Milwaukee*, 101 Wis.2d 670, 305 N.W.2d 174 at 177-178 (Wis. Ct. Apps. 1981). *Damage remedies are expressly eliminated.* Within 30 days of a raze order the owner must seek a judicial order restraining the building inspector from razing the building. The restraining order issues upon application and a hearing must be set within 20 days as a matter of statutory mandate.

At the hearing, the Court's *only function* is to determine whether the building inspector's exercise of discretion is reasonable or unreasonable. If it is reasonable, then the restraint must be dissolved. If it is unreasonable, then the restraint may be continued or modified. § 66.05(3), Wis. Stats.

Most importantly, if the building inspector has made a determination, aided by the presumption or otherwise, that repair is unreasonable, and if the reviewing court finds that the determination that repair is unreasonable made by the building inspector is a reasonable exercise of the inspector's discretion, *then* (a) the owner has no option to repair the premises, and (b) the court has no power to allow repair by the owner. *City of Appleton* v. *Brunschweiler*, 52 Wis.2d 303, 190 N.W.2d 545 (1971).

As the Court of Appeals noted, the constitutionality of § 66.05 has been discussed in appeals from § 66.05 orders. *Posnanski, supra*; *City of Appleton, supra.* However, the very language of those cases militate against the Court of Appeals' conclusion that petitioners' claims could have been raised as a defense to the reasonableness of the raze order. All of the considerations addressed by those courts deal with

factual issues concerning the conditions of the building and costs of repair. As the Court stated in *Posnanski*:

> "In any event the presumption expressed in the statute (which places a burden upon the property owner to show facts to the contrary), setting the benchmark of unreasonableness at 50 percent, cannot be challenged as unreasonable in this court. *Boden* v. *Milwaukee*, 8 Wis.2d 318, 99 N.W.2d 156 (1959); *State* v. *Laaks*, 171 Wis. 557, 177 N.W. 916 (1920). *Only* if a property owner can show that *the legislature's formula* operates arbitrarily in the individual case can a court, after due consideration of the legislature's declared public policy of ridding the state of old and dilapidated buildings, make a finding that a reconstruction in excess of the 50 percent limit be allowed." [Emphasis Added] 213 N.W.2d at 54.

Thus, the constitutionality of the 50 percent presumption, *per se, is beyond constitutional challenge* in deference to the police powers of the state. The *only* issue that may be addressed is whether the *formula* operates arbitrarily in relation to the cost of repairs. The question of arbitrariness relates only to whether the building inspector was reasonable in his discretionary determinations of building code violations and unreasonable costs of repair. If the building in this case existed in the condition contemplated in the statute, all other questions were foreclosed including whether the motivations for, and methods of enforcement violated petitioners' constitutional rights.

The limited nature of this proceeding renders the general preclusion principles of Wisconsin indeterminate. In such situations, a federal rule of claim preclusion is necessary. *Marrese, supra*, 53 L.W. at 4269 (Burger, C.J., concurring). The rule proposed by the Chief Justice is "that a party is precluded from asserting a claim that he had a 'full and fair opportunity' to litigate in a prior action. Cites omitted." *Id.* Applying this rule to petitioners, it is clear that no such opportunity existed. See, *Hagee* v. *City of Evanston*, 729 F.2d 510, 515 n.9 (CA7 1984). The very narrow scope of the reasonableness inquiry completely precluded petitioners from airing their constitutional claims. On these facts, this

Court should grant the Petition for a Writ of Certiorari and reverse the judgment of the lower court.

CONCLUSION

It is respectfully submitted that the Supreme Court should declare that Wisconsin principles of claim preclusion are indeterminate in regard to whether proceedings pursuant to § 66.05, Wis. Stats., to raze a building bar subsequent federal claims under 42 U.S.C. § 1983. Where state preclusion principles are indeterminate this Court should adopt a federal test assessing whether a party had a full and fair opportunity to litigate the claim. The Supreme Court should grant the Petition for Certiorari and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Dated at Milwaukee, Wisconsin, this 5th day of April, 1985.

Respectfully submitted,

SUTTON & KELLY
By: Robert E. Sutton
Attorneys for Petitioners

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2998

LAWRENCE VANDENPLAS and BARBARA VANDENPLAS,
Plaintiffs-Appellants,

v.

CITY OF MUSKEGO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for
the Eastern District of Wisconsin.
No. 81 C 1043—John W. Reynolds, *Judge.*

ARGUED NOVEMBER 9, 1984—DECIDED JANUARY 21, 1985

Before WOOD and CUDAHY, *Circuit Judges,* and WISDOM, *Senior Circuit Judge.**

CUDAHY, *Circuit Judge.* This is an appeal from a final judgment entered on a jury verdict in an action for damages and declaratory relief under 42 U.S.C. § 1983. The plaintiffs, Lawrence Vandenplas and his daughter Barbara Vandenplas, sued the City of Muskego, Wisconsin, and various of its employees and elected and appointed officials for damages arising out of the allegedly uncon-

* The Honorable John Minor Wisdom, Senior Circuit Judge of the Fifth Circuit Court of Appeals, is sitting by designation.

stitutional manner in which the defendants razed two buildings on the Vandenplases' farm. The trial court granted summary judgment for all defendants except certain unnamed police officers. Plaintiffs were given leave to amend their complaint, did so, and reached a jury on the issue of unconstitutional use of force by the police officers. The jury found for the defendant officers. The plaintiffs now appeal the grant of summary judgment as to all other defendants and the jury verdict as to the police defendants.

I.

Lawrence Vandenplas and his wife Bernice own property in the City of Muskego on which, before the events recounted here, were located an old farmhouse and a barn which were used for storing grain and housing hogs respectively. The buildings had fallen into a state of disrepair, and on August 8, 1980, defendant Gerald P. Lee, the building inspector for the city, issued a condemnation order for both structures pursuant to § 66.05, WIS. STAT. (1979-80). That statute provides, in part, as follows:

> (1)(a) The governing body or the inspector of buildings * * * may order the owner of premises upon which is located any building or part thereof within such municipality, which in its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof, or if it can be made safe by repairs to repair and make safe and sanitary or to raze and remove at the owner's option[.] * * *
>
> (b) Whenever a municipal governing body, inspector of buildings or designated officer determines that the cost of such repairs would exceed 50 per cent

of the assessed value of such building divided by the ratio of the assessed value to the recommended value as last published by the state supervisor of assessments for the municipality within which such building is located, such repairs shall be presumed unreasonable and it shall be presumed for the purposes of this section that such building is a public nuisance.

* * *

(3) Anyone affected by any such order shall within the time provided by s. 893.76 apply to the circuit court for an order restraining the inspector of buildings or other designated officer from razing and removing the building or part thereof or forever be barred. Hearing shall be had within 20 days and shall be given precedence over other matters on the court's calendar. The court shall determine whether the order of the inspector of buildings is reasonable, and if found reasonable the court shall dissolve the restraining order, and if found not reasonable the court shall continue the restraining order or modify it as the circumstances require. Costs shall be in the discretion of the court. If the court finds that the order of the inspector of buildings is unreasonable, the inspector of buildings or other designated officer shall issue no other order pursuant to the authority of this section in regard to the same building or part thereof until its condition is substantially changed. The remedies provided in this subsection are exclusive remedies and anyone affected by such an order of the inspector shall not be entitled to recover any damages for the razing and removal of any such building.

* * *

(8)(c) Either the owner or the city or village may appeal to the court of appeals within 30 days from the date of entry of the order of the circuit court.

WIS. STAT. § 66.05 (1979-80).[1]

Pursuant to § 66.05, the Vandenplases filed suit in Waukesha County Circuit Court to enjoin the proposed destruction of the buildings. The court entered a temporary restraining order as required by the statute, and conducted a hearing on September 3 and 4, 1980. The building inspector testified to the condition of the building and the unreasonableness of repairs, Mr. Vandenplas testified to the agricultural use of the buildings and his intention to effect repairs and the judge viewed the property. The court entered an order on September 8, 1980, finding the raze order reasonable, but staying any demolition for six months to allow plaintiffs to repair the buildings. This order was not appealed.

The plaintiffs returned to the circuit court on March 12, 1981, seeking an extension of time to continue making repairs. The court entered a temporary restraining order as required by the statute, and held an evidentiary hearing on March 23, 1981, at which Mr. Vandenplas testified to the repairs he had made and would make. The court dissolved the temporary restraining order and refused to grant a further stay, finding substantial progress had not been made in repairing and restoring the buildings. The plaintiffs appealed to the Wisconsin Court of Appeals, which temporarily stayed the circuit court order. On April 15, 1981, the court of appeals vacated its temporary stay and dismissed the appeal, holding that the plaintiffs' failure to appeal the September 8, 1980, order barred them from challenging the reasonableness of the raze order or the denial of a permanent injunction. The appellate court further held that the circuit court had lacked authority to grant the original six month stay once it determined the raze order was reasonable. Plaintiffs did not seek further appellate review.

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[1] Section 66.05 has since been amended in ways not relevant to this appeal. *See* WIS. STAT. ANN. § 66.05 (West 1984).

On May 11, 1981, the City informed the Vandenplases that it would proceed with the razing of the buildings. Mr. Vandenplas sought and obtained a temporary restraining order from the circuit court. The court then held a hearing May 12, 1981, at which it confirmed its previous order allowing the razing of the buildings. Mr. Vandenplas then sought injunctive relief on due process and equal protection grounds in federal district court. The district court denied the motion for a temporary restraining order after a hearing and dismissed the complaint.

Finally the Vandenplases sought passage of a special resolution by the Common Council of the city allowing them to continue repairs and to avoid destruction of the buildings. The resolution was defeated, several individual defendants voting against it, allegedly with the consent of the mayor, also a defendant. On June 12, 1981, the buildings were razed by employees of the city public works department. Plaintiffs allege that during the demolition they were subjected to excessive force by the police defendants.

Plaintiffs seek a declaratory judgment that § 66.05 is unconstitutional on its face as providing inadequate notice and opportunity for hearing, and as applied to their property since the property was not in the condition complained of and was not significantly different from other uninhabited farm properties in the city which have not been subject to raze orders. They also allege that both the condemnation order and the refusal to grant a variance were motiviated by a desire to retaliate for Mr. Vandenplas's exercise of his First Amendment rights and his successful opposition to previous actions brought against him by the city. The plaintiffs also seek compensatory and punitive damages. The plaintiffs' claims were summarized by the district court as follows:

> "(1) The property owners, Mr. and Mrs. Vandenplas, sue the Building Inspector and the City of Muskego for razing their buildings rather than allowing them to repair them. It is alleged that such

behavior was in violation of the equal protection and due process clauses of the Fourteenth Amendment.

"(2) The property owners, Mr. and Mrs. Vandenplas, sue the Building Inspector, the Mayor, and the City of Muskego for razing their buildings. It is alleged that such behavior was retaliatory punishment against Mr. and Mrs. Vandenplas for exercising their rights to disagree with the City, resist it in the courts, and maintain their property as farm property in the face of residential objection.

"(3) The property owners, Mr. and Mrs. Vandenplas, sue the four-member majority of the Common Council, the Building Inspector, the Mayor, and the City for refusing a special resolution that would have permitted them to complete repairs and avoided destruction of the buildings. It is alleged that such refusal was retaliatory punishment against Mr. and Mrs. Vandenplas for exercising their rights to disagree with the City, resist it in the courts, and resist the original raze order.

"(4) The property owners, Mr. and Mrs. Vandenplas, and their daughter, Barbara, sue the Mayor, the Building Inspector and the Richard Roe police defendant for excessive force on the scene of the demolition of the buildings on June 12, 1981.

"(5) As to all of the above claims the City of Muskego is also a defendant on the basis of its indemnity liability under § 895.46, Wis. Stats., as to any individual defendant found liable, upon the basis that all defendants were acting within the scope of their respective employments.

"(6) As to claims (1) and (2) above the John Doe public works defendant is joined for executing the constitutional violations in the actual razing of the buildings."

Decision and Order of the district court, July 22, 1982, at 5 (quoting plaintiffs' brief answering defendants' motion for summary judgment at 8-9).

The district court granted summary judgment for defendants on claims (1) and (2) on the grounds that they were barred as *res judicata* by the state court proceedings. The court also held that claims (3) and (6) did not state actionable claims under the circumstances of this case. Thus summary judgment was granted on all but claim (4) and so much of claim (5) as related to indemnification for liability imposed on account of claim (4). The plaintiffs amended their complaint to name individual police officers, and claim (4) was tried to a jury. The trial court dismissed some of the named police officers after the plaintiffs' evidence, and the jury returned a verdict in favor of the remaining defendants. Plaintiffs appeal the grant of summary judgment on claims (1) and (2) as *res judicata* and on claims (3) and (6) for failure to state a claim upon which relief may be granted. Plaintiffs also appeal the jury verdict as against the weight of the evidence.

II.

A state court judgment must be given the same *res judicata* effect in federal court that it would be given in the courts of the rendering state. *Migra v. Warren City School District Board of Education*, 104 S. Ct. 892 (1984); *Mandarino v. Pollard*, 718 F.2d 845, 848 (7th Cir. 1983), *cert. denied*, 105 S. Ct. 116 (1984); 28 U.S.C. § 1738. *But see Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir.) (*en banc*) (federal courts may give greater *res judicata* effect to state court judgments than would courts of rendering state), *cert. granted*, 104 S. Ct. 3553 (1984). This rule applies to § 1983 actions with respect to the issues actually litigated, *Allen v. McCurry*, 449 U.S. 90 (1980), and also issues which could have been

but were not litigated in the state court proceedings, *Lee v. City of Peoria*, 685 F.2d 196, 198-99 (7th Cir. 1982). *Migra v. Warren City School District Board of Education*, 104 S. Ct. 892 (1984). Thus our determination whether the Vandenplases' § 1983 claim is barred turns on the preclusive effect the various state court proceedings would have under the law of Wisconsin.

Wisconsin *res judicata* doctrine states that a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or might have been litigated in the former proceedings. *DePratt v. West Bend Mutual Insurance Co.*, 113 Wis. 2d 306, 310, 334 N.W.2d 883, 885 (1983); *Barbian v. Lindner Bros. Trucking Co.*, 106 Wis. 2d 291, 316 N.W.2d 371 (1982); *Leimert v. McCann*, 79 Wis. 2d 289, 255 N.W.2d 526 (1977); *Gohn v. Beranek*, 266 Wis. 605, 64 N.W.2d 246 (1954).

Plaintiffs admit that their due process, equal protection and retaliation arguments were not raised in the state court proceedings, but argue that § 66.05 proceedings, which have been held to be the exclusive means of challenging a § 66.05 raze order, *Gehr v. City of Sheboygan*, 81 Wis. 2d 117, 260 N.W.2d 30 (1977); *Donley v. Boettcher*, 79 Wis. 2d 393, 255 N.W.2d 574 (1977), are relatively narrow, and that they could not raise their constitutional claims in the § 66.05 proceeding. Although it is true that the circuit court in a § 66.05 action may determine only the reasonableness or lack of reasonableness of the raze order and repairs, and may not order more repairs than are necessary to protect the public interest, *Donley v. Boettcher*, 79 Wis. 2d 393, 255 N.W.2d 574 (1977), it does not follow that the property owner cannot raise constitutional issues. A raze order issued in retaliation for First Amendment activities would not, indeed could not, be reasonable. A successful claim of unconstitutionality would be, in effect, an affirmative defense to the reasonableness of a raze order. And an affirmative defense not

raised cannot be used to collaterally attack the judgment in which it could have been but was not interposed. *Conway v. Division of Conservation, Dept. of Natural Resources*, 50 Wis. 2d 152, 183 N.W.2d 77, 81 (1971). In addition, the Wisconsin Supreme Court has considered challenges to the constitutionality of § 66.05 in § 66.05 proceedings. *Posnanski v. City of West Allis*, 61 Wis. 2d 461, 213 N.W.2d 51 (1973); *City of Appleton v. Brunschweiler*, 52 Wis. 2d 303, 190 N.E.2d 545 (1971). *See also Baker v. Mueller*, 222 F.2d 180 (7th Cir. 1955). Therefore, we conclude that the Vandenplases' claims could have been raised in the § 66.05 proceedings.

The fact that damages are not available in § 66.05 actions does not alter this result. If the Vandenplases had raised the constitutional issues and prevailed, the demolition would never have taken place, and there would be no damages to award. If the Vandenplases had not prevailed on the constitutional issues, there would be no constitutional violation for which to award damages.

The plaintiffs' reliance on *Barbian v. Lindner Bros. Trucking Co.*, 106 Wis. 2d 291, 316 N.W.2d 371, 374-75 (1982) is misplaced. In that case the Wisconsin Supreme Court adopted an exception to general *res judicata* principles, holding that a judgment in a claim for declaratory relief is only binding as to issues actually litigated and decided, and is not binding as to issues which might have been litigated but were not. The Vandenplases here sought injunctive, not declaratory, relief in the state proceedings. Judgments in injunctive proceedings, as distinguished from declaratory judgments, bar later litigation of issues which might have been raised but were not. *Leimert v. McCann*, 79 Wis. 2d 289, 293-94, 255 N.W.2d 526, 529 (1977); *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). *See also State v. Donohue*, 11 Wis. 2d 517, 523, 105 N.W.2d 844, 847-48 (1960) (principle of *res judicata* not inapplicable if former adjudication is rendered in special proceeding rather than in traditional

common law action). Thus, the district court was correct in granting summary judgment on claims (1) and (2) as barred by *res judicata*.

Plaintiffs' second claim on appeal is that the trial court erred in dismissing claims (3) and (6) for failure to state a claim upon which relief could be granted. The Vandenplases' claim (3) is not that the Common Council was required to reconsider the raze order, but that it had the power to issue a special resolution revoking the raze order. The trial court was

> satisfied that the council members were entitled to rely on the judicial adjudication of the reasonableness of the raze order and to carry out the court order, whatever their motives in so doing, without fear of incurring liability for effectuating a valid court order.

Decision and Order of July 22, 1982, at 8. (The same reasoning was applied in dismissing claim (6) against the unnamed public works defendants.) The district court's reasoning seems too sweeping, but, at least as applied here, reaches the correct result. Although plaintiffs make conclusory allegations of retaliation, *see* Complaint ¶ 19, they have not sufficiently alleged, nor submitted any affidavits or evidence tending to show, that they were treated in a discriminatory manner by the city council. They do not, for instance, assert that the council had a general practice of passing special resolutions to reverse raze orders for structures belonging to others who were in the situation of the Vandenplases but who had not engaged in protected First Amendment activity. In a case where facts implicating the First Amendment *were* properly alleged, the motives of the members of the town council in relying on the state court adjudication would presumably be relevant. *Compare Hanover Township Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972) (affirming dismissal of action alleging retaliatory discrimination brought by 22 union

members where no allegation or evidence that individual contracts offered plaintiffs were less favorable than those accepted by non-union teachers or than those contracts defendants were required to offer to reinstated union leaders) *with McGill v. Board of Education*, 602 F.2d 774 (7th Cir. 1979) (evidence supported jury verdict that transfer of teacher from one school to another was in retaliation for protected speech; there were specific allegations of retaliatory motivation as evidenced by defendants' statements). Absent some such allegations, however, claims (3) and (6) fail to state a claim upon which relief may be granted, and summary judgment for the defendants was proper.

The final issue on appeal is the propriety of the jury verdict in favor of the defendant police officers. The question of credibility and weight of the evidence is within the purview of the jury, whose verdict cannot be lightly set aside so long as it has a reasonable basis in the record. *Lenard v. Argento*, 699 F.2d 874, 882 (7th Cir.), *cert. denied*, 104 S. Ct. 69 (1983). We view the evidence in the light most favorable to the prevailing parties. *Id.* The evidence in the present case included testimony by plaintiffs and their witnesses as well as by the police defendants. In addition, the jury watched two videotapes, one made by each side, of certain events involving the alleged excessive use of force. On reviewing the evidence, including the videotapes which both parties specially invited us to view, we find "there was a reasonable basis in the record for the jury verdict." *Id.* The verdict will not be disturbed.

For the reasons given above, the judgment of the district court will be, and is, AFFIRMED.